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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 13

EDWARD J. GARRITY, ET AL., *Appellants,*

v.

NEW JERSEY

Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

The appellants herein are Edward J. Garrity, Edward Virtue, James Holroyd, Eugene D. Elwell and Donald Murray. They respectfully request that their judgments of conviction, as affirmed by the Supreme Court of New Jersey, be reversed.

These appellants were tried and convicted in two separate proceedings, which have been consolidated on the appeal to this Court. The first group of appellants

so tried was composed of Edward J. Garrity and Edward Virtue, along with Helen B. Naglee, now deceased.[1] The second group was composed of James Holroyd, Eugene D. Elwell and Donald Murray.[2] By stipulation in the Camden County Court, it was agreed by the State and by counsel for the second group that the legal arguments and contentions were identical to those raised in the other proceeding and that the only factual distinction related to the dates upon which statements had been taken of the respective appellants. 13(2)R. 531-532. The appeals from the judgments of conviction were subsequently argued on the same date before the Supreme Court of New Jersey. Separate opinions were rendered on different dates by that court in the two proceedings, but the court in the Holroyd-Elwell-Murray case relied almost exclusively upon its opinion in the Garrity-Virtue-Naglee case.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey in the Garrity-Virtue-Naglee case, known as *State of New Jersey* v. *Naglee, et al.*, was rendered on March 1, 1965, and is reported at 44 N.J. 209, 207 A. 2d 689. It appears in 13(1)R. 316.

The opinion of the Supreme Court of New Jersey in the Holroyd-Elwell-Murray case, known as *State of New Jersey* v. *Holroyd, et al.*, was rendered on March

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[1] The case was known in the Supreme Court of New Jersey as *State of New Jersey* v. *Naglee, et al.*, and the record in that proceeding is before this Court in Volume 1 of the printed record, referred to herein as 13(1)R. ——.

[2] The record of the Holroyd-Elwell-Murray case is before this Court in Volume 2 of the printed record, referred to herein as 13(2)R. ——.

15, 1965, and is reported at 44 N.J. 259, 208 A. 2d 146. It appears in 13(2)R. 553.

The unreported opinion of the Camden County Court, which reflected that court's denial of new trial motions in both cases, was rendered on June 21, 1963, and appears at 13(2)R. 533.

JURISDICTION

The opinion and judgment of the Supreme Court of New Jersey affirming the judgments of conviction of Edward J. Garrity and Edward Virtue were entered on March 1, 1965. The Notice of Appeal to this Court was filed on May 25, 1965. 13(1)R. 330. The Jurisdictional Statement was filed in this Court on July 22, 1965. On March 21, 1966, this Court entered an order postponing further consideration of the question of appeal jurisdiction to the hearing of the case on the merits. 383 U.S. 941.

The opinion and judgment of the Supreme Court of New Jersey affirming the judgments of conviction of James Holroyd, Eugene D. Elwell and Donald Murray were entered on March 15, 1965. 13(2)R. 559. The Notice of Appeal to this Court was filed on June 11, 1965. 13(2)R. 502. The Jurisdictional Statement, which encompassed both proceedings, was filed in this Court on July 22, 1965. And on March 21, 1966, this Court entered its order postponing consideration of the jurisdictional question as to the appeal. 383 U.S. 941.

The appeal jurisdiction of this Court has been invoked under 28 U.S.C. § 1257(2). Further discussion of the jurisdictional question, adverted to by this Court's order of March 21, 1966, is to be found in the portion of this Brief entitled The Question of Jurisdiction, pp. 19-23, *infra*.

QUESTIONS PRESENTED

The questions presented are:

1. (a) Does N.J.S.A. 2A:81-17.1 violate the 14th Amendment when said statute compels holders of public office to give testimony about matters relating to their office where, if the office holders refuse to testify on the grounds of possible self-incrimination, they forfeit their office and pension rights and thereafter are permanently ineligible for election or appointment to any public office in the state?

(b) Does the 14th Amendment prohibit the admission in evidence during a criminal trial of statements obtained under N.J.S.A. 2A:81-17.1, which compels a defendant police officer to make the statement or be discharged from his employment?

2. Is it repugnant to constitutional guarantees of due process for the highest court of New Jersey, of its own motion, to order an investigation of an alleged law violation; refer the results of said investigation for prosecution; and, then, as the tribunal of last resort within the state, review the appeal of convicted defendants who were subjects of the original court-initiated investigation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Session Law 1953, Chapter 259, Page 1759, and cited as New Jersey Statutes Annotated (N.J.S.A.) 2A:81-17.1.

Any person holding or who has held any elective or appointive public office, position or employment (whether State, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceedings wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this State which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right or tenure or pension granted to him by any law of this State provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in the State.

STATEMENT OF THE CASE

Appellants Edward J. Garrity and Edward Virtue were police officers of the Borough of Bellmawr, New Jersey. Helen B. Naglee, a defendant below but now deceased, was the Violation Clerk and Court Clerk of the Municipal Court of the Borough of Bellmawr. Appellants James Holroyd, Eugene D. Elwell and Donald Murray were police officers of the Borough of Barrington, New Jersey. Each had served as Deputy Violation Clerk of the Municipal Court of the Borough of Barrington.

On June 30, 1961, the Supreme Court of New Jersey entered orders directing the Attorney General of the State of New Jersey to conduct investigations of alleged "ticket-fixing" in certain municipalities in Camden County, namely the Boroughs of Bellmawr and Barrington. Certified copies of these orders, and amendments thereto, have been filed with the Clerk of this Court and are reproduced in Appendix B hereto, p. 3a, *infra*. Under these orders of the Supreme Court, the Attorney General was authorized to issue subpoenas, require the attendance of witnesses and the production of documents, impound records, and conduct an *in camera* hearing before a master. The Supreme Court later amended its orders to direct that, instead of conducting a hearing before a master, the Attorney General prepare reports and file them with the Clerk of the Supreme Court. See Appendix B hereto, pp. 5a, 8a, *infra*.

Deputy Attorney General Budd M. Rigg, pursuant to said orders, was assigned to the investigations. During the course of the inquiry, Rigg developed the fact that in each borough a number of traffic-violation tickets had been down-graded to lesser charges. Fol-

lowing this development, Deputy Attorney General Rigg demanded and obtained sworn statements from all the appellants herein. These statements may be described as of an incriminating nature. The Deputy Attorney General prefaced the questions which elicited the statements with warnings as hereinafter quoted:

1. Warning Given to Edward J. Garrity (Read to Jury. 13(1) R. 108):

Q. Before I get started, because of the lateness of the hour and other commitments, I will undoubtedly have to question you again, as well as Mrs. Naglee and perhaps one or two of the officers.

I would just like to establish a few things here quickly now. Before I do, however, you I know are aware of the purpose of the investigation of your being here today. Before I ask you any questions concerning this investigation into the alleged irregularities of the handling of municipal traffic violations by your department, I want to advise you that anything you say must be said of your own free will and accord without any threats of promises or coercion, and anything you say may be, of course, used against you or any other person in any subsequent criminal proceedings in the courts of our State.

You do have under our laws, as you probably know, a privilege to refuse to make any disclosure which may tend to incriminate you. If you make a disclosure with knowledge of this right or privilege, voluntarily, you thereby waive that right or privilege in relation to any other questions which I might put to you relevant to such disclosure and this investigation.

This right or privilege which you have is somewhat limited to the extent that you as a police officer under the laws of our state may be subject to a proceeding to have you removed from office

if you refuse to answer a question put to you under oath pertaining to your office or your function within that office. It doesn't mean, however, you can't exercise the right. You do have the right. (Emphasis added).

A. No, I will cooperate.

Q. Understanding this, are you willing to proceed at this time and answer any questions?

A. Yes.

---

2. Warning Given to Edward Virtue (Read to Jury. 13(1) R. 86):

Q. You are a Sergeant?

A. Detective.

Q. As you know by now, Detective, I am working under a Supreme Court order issued last June directing me to investigate certain irregularities in the handling of motor vehicle matters in the Municipal Court here in Bellmawr, together with various persons having any connection with the court, including the police department. That is why I scheduled this day, to ask you questions pertaining to this investigation.

Before I do, I want to advise you anything you say must be voluntary, of your own free will, without threats or coercion or promise or reward and anything you do say may be used against you or any person in a subsequent criminal proceeding or proceedings in the courts of our state.

You do have under our statutes, as you may know, a privilege to refuse to disclose any matters which may tend to incriminate you; however, if you make such a disclosure with knowledge of this right and without coercion, you thereby waive this right or privilege with regard to any phase of this investigation.

This right or privilege that you have is limited to the extent that you as a police officer when sworn and asked questions pertaining to your office and your conduct therein, if you refuse to answer, you then may be subject to a proceeding to have you removed from the department. (Emphasis added).

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3. Warning Given to Helen B. Naglee (Read to Jury, 13(1) R. 91):

Q. Mrs. Naglee, as you know I am working under a Supreme Court order dated this last June whereby or whereunder I am directed to conduct an investigation of certain irregularities in the handling of motor vehicle cases in the municipal court, and apparently the police department here in the Borough of Bellmawr, and it is pursuant to that order that I have asked you to answer some questions which I want to put to you.

Before you do, however, I want you to be fully aware of the fact that anything you say must be voluntary and of your own free will and accord without any threats, promises or reward or any coercion.

You do have a privilege to refuse to make any disclosure or give any answers which tend to incriminate you. Things that you tell me today may be used against you or any other person in a subsequent criminal proceeding. That is why you have that privilege under the law.

However, if you do answer a question and make a disclosure, by so doing you thereby waive this right or privilege that you have in relation to the entire investigation.

You understand that?

A. I do.

Q. And understanding that you are willing to proceed then?

A. Yes.

---

4. Warning Given to James Holroyd (Read to Jury, 13(2) R. 358):

Q. All right, under a Supreme Court order dated the 20th of June, 1961, I have been directed to investigate irregularities in the handling of municipal court vehicle matters in the Borough of Barrington, and how they have been handled by the court, and local police departments. As a result, I have asked you to come in here today so that I may put questions to you.

A. Yes.

Q. I want you to realize fully, however, any answers you give must be voluntary, without any coercion, threat, or promise of reward, and those answers may be used against you or any other person. You have a privilege to refuse to disclose any matters which might tend to incriminate you, however, if you make such a disclosure you thereby waive your right or privilege in relation to any phase of this investigation in the future.

Under our laws, as a police officer, you are subject to a statute which provides however, if you exercise this right or privilege, a proceeding may be instituted against you to have you removed from office. (Emphasis added).

A. Yes.

Q. Knowing all of this, you are willing to proceed?

A. Yes.

5. Warning Given to Eugene D. Elwell (Read to Jury. 19(2) R. 352):

Q. Mr. Elwell, as you know, I have been directed by the Supreme Court order dated the 30th of June, 1961, to investigate irregularities in the handling of motor vehicle matters in the Municipal Court of Barrington, together with the conduct of all persons connected with this Court, and specifically the police department. It is for this reason I have asked you to be here today, so I could ask you certain questions pertaining to this investigation.

I want to advise you anything you say to me must of course be of your own free will and of course without any threats, coercion, or promise of reward I advise you further that you do have as every citizen has, under the laws of New Jersey, a privilege to refuse to disclose any matter which may tend to incriminate you, and further with full knowledge of this investigation, you thereby waive this right of privilege, in relation to any phase of this investigation, which might involve you.

This privilege is somewhat limited, under our laws, to the extent that a police officer who under oath during investigation, fails to testify or answer a specific question does thereby jeopardize his position on the force and may be removed under the proper proceedings. Understanding that, do you wish to proceed this morning and answer the questions which I intend to put to you? (Emphasis added).

A. I do, sir.

8. Warning Given to Donald Murray (Read to Jury, 13(2) R. 355-356):

Q. Mr. Murray, as you know, I am working a Supreme Court order issued on the 30th day of June, 1961, directing me to investigate certain irregularities in the handling of municipal traffic matters in the court, and by various members of the police department in Barrington. It is pursuant to that order that I ask you to come in here today, and ask you questions.

Before I do, I want to advise you that anything you say must be voluntary, and of your own free will, without any coercion or threat or promise of reward. I want to advise you also anything you say may be used against you or any person in any subsequent criminal proceeding in our courts in New Jersey. You do have a privilege to refuse to disclose any matters which you feel would tend to incriminate you. However, being aware of that, and if you make a disclosure, you waive that privilege or right in relation to any matters pertaining to this investigation, *there is one limitation of your privilege to the event that a proceeding may be brought against you under the laws of our state as a police officer, to have you removed from office if you refuse to answer my questions put to you pertaining to your official duties. Understanding this, Mr. Murray, do you wish to proceed this morning and answer the questions I put to you?* (Emphasis added).

A. Yes.

The "laws of our state", "statute" and "under our laws" referred to in the foregoing meant N.J.S.A. 2A:81-17.1. All appellants were public employees and that statute makes mandatory the discharge of any public employee who claims or asserts the constitutional privilege against self-incrimination when re-

quired to testify upon matters relating to his official conduct. In addition, the statute provides that any person "so forfeiting his office . . . shall not thereafter be eligible for election or appointment to any public office, position or employment in the State."

The investigation conducted by Deputy Attorney General Rigg was subsequently referred for completion to the Prosecutor for Camden County, New Jersey. Thereafter, Assistant Prosecutor Sidney Kaplan demanded and obtained additional statements from each of the appellants herein covering the same subject matters as the statements taken by Deputy Attorney General Rigg. The Kaplan statements, like the Rigg statements, were admitted into evidence at the trials over the objections of defense counsel. But the Kaplan statements differed from the Rigg statements in that Kaplan, in warning the appellants of their right to remain silent, did not threaten and apparently made no reference to the possible loss of employment should they remain silent. At the trials, defense counsel argued that the threats made by Rigg concerning employment forfeiture carried over to the statements later taken by Kaplan, so that the appellants were under the same coercive compulsion at the time the Kaplan statements were obtained.

In two separate indictments (see 13(1)R. 1 and 13(2)R. 333) the various appellants were charged with conspiring to obstruct and pervert the due administration of the Motor Vehicle Traffic Laws of New Jersey, in violation of N.J.S.A. 2A:98-1. Garrity, Virtue and Naglee were brought to trial April 29, 1963. Holroyd, Elwell and Murray were brought to trial May 27, 1963. Both trials were before the same presiding Judge and both cases were prosecuted by the

same Assistant Prosecutor for Camden County, New Jersey. During the trial, the prosecution offered, over the vigorous objections of defense counsel, the statements obtained from each defendant. The trial court rejected defense counsel's objections and ruled that the statements were voluntarily given and admitted the statements in evidence.

The principal objection of counsel was that the warning of loss of job pursuant to N.J.S.A. 2A:81-17.1, if defendants refused to give a statement, not only violated their constitutional guarantee against self-incrimination, but was a threat so strong and coercive as to thereafter make involuntary any statement which a defendant might make.

A portion of the argument between defense attorney Malandra and prosecutor Aiken before Judge Mitchell of the Camden County Court follows:

> Mr. Malandra: This is where I would like to enter an objection, to this statement. If Your Honor pleases, this is on the ground that the statement with the admonition as given by Mr. Rigg, could not thereafter be voluntary. You will note that the statement is completely void of any remark whatsoever concerning the right of this defendant to have counsel. There is no remark whatsoever concerning counsel.[3] Secondly, may it please the court, you will note that the latter part, the last statement made by Mr. Rigg is that *this right or privilege that you have is limited to the extent that you as a police officer, when sworn and asked questions pertaining to your office and your conduct therein, if you refuse to answer, you may then be subject to a proceeding to have you re-*

[3] No issue is raised in this appeal as to right of counsel, or the denial thereof.

moved from the department. (Emphasis added) Now, as I say, Your Honor, that this is not advising the defendant of his constitutional right, by saying to him if you do not cooperate, you will be removed from the police force. Now, there is your choice. Either come on or get out. Now, under those circumstances, may it please the court, I cannot see how this statement can be voluntary.

The Court: I'll hear you, Prosecutor.

Mr. Malandra: Iwould like to add, may it please the court that this is not an ordinary statement. This is more or less like an inquisition by the Attorney General of the State of New Jersey, waiving a Supreme Court flag. Now, Your Honor please, under those circumstances, I can't see how it could be voluntary, anything that he said after that.

Mr. Aiken: Your Honor, I think the admonition contained in the statement of rights by Mr. Rigg is quite required, as a matter of fact, I believe it to be required by our statutes and I would like to call the court's attention to 2-A:8771.1, I think it is, but anyway that is the Statute, Your Honor, as I understand it, requiring this warning to be given because it also requires that if a public official does not testify to give his statements that proper proceedings, he is subject to removal from office, or whatever it happens to be. And, I think that if the warning had not been given, then the defendants would be in the position of coming in and saying, well, I wasn't warned of that situation, and I should've been. So that he can play it either way, if he desires, and obviously that is not the intent of the statute.

Mr. Malandra: If Your Honor please, I argue that a little bit differently, that statute says that if a police officer refuses to testify by taking the fifth amendment, he subjects himself to being chased out of the department. That's got nothing to do with

this, because if he refused to take it, the next procedure not this one, the next proceeding would be to take him out, but he would certainly have a right to refuse here. This was given as a threat. [13(1)R. 16-17].

* * * * * *

We're in a position where an entire life is gone, job, pension, life, everything is gone. [13(1)R. 19].

* * * * * *

The Court: That is where upon you and the Assistant Prosecutor disagreed. Well, let's confine our argument to that particular paragraph, to crystallize the issue here in dispute. Now, 17.1 was what you were talking about, so that we may all understand 17.1, let's read it.

I'm reading from New Jersey Revised Statutes, annotated 2A:81-17.1, forfeiture of office or employment pertaining to pension rights, to testify on the ground it is incrimination. This of course, is a statute passed by the legislature of New Jersey, and it is comparatively new in origin . [13(1) 20].

* * * * * *

Now, let us assume that some policeman or some public official is acquainted with this particular statute. Don't you think that it's the right and the obligation of the person questioning him to explain his rights, either he can stand merely upon his constitutional rights, which are guaranteed, they could have refused to answer. The only thing if they had refused to answer, then as a public official, an answer would be you must forfeit certain rights that you ordinarily would have under the constitutional provisions, merely because they're a public official, whereas you for example, you could still refuse to answer and nobody could do a thing to you, but if you were a public official, the legislature saw fit to arrange a proceeding, where if it

were probably proven, you could forfeit the rights you had under the particular office, and alike.

Now, that is what the legislature said, my feelin the matter, and of course, is that instead of, shall we say jeopardizing his position, *I think Mr. Rigg was obligated under the circumstances, to give this explanation to him, not as a threat, but explanation of his rights legally.* (Emphasis added). [13(1)R. 22].

* * * * * *

We have a situation here where the attorney general, in my opinion, at least, is telling him you have a choice of either relying entirely upon the constitutional rights, but if you do, I want to inform you that by the state law of New Jersey, you may get hurt as far as a penalty is concerned. Now that is the way I read it. You may have some different opinion or interpretation, and if mine is wrong, please persuade me that I am wrong by additional argument.

The appellants were all found guilty as charged. They thereupon filed a consolidated motion for new trial and arrest of judgment. That motion alleged *inter alia* that (1) the incriminating statements had been obtained and then admitted into evidence in violation of appellants' rights under the Fourteenth Amendment, and (2) the statements were illegally admitted into evidence in that they had been obtained "by force of a statute that violated the New Jersey Constitution and the 14th Amendment of the U. S. Constitution." See 13(2)R. 529. Judge Mitchell of the Camden County Court denied the motion on June 21, 1963. In an extended written opinion, he ruled *inter alia* that (1) the statements made by the appellants were voluntary as a matter of law, despite the references made to the New Jersey employment forfeiture statute, and

(2) that statute, N.J.S.A. 2A: 81-17.1, in terms of its application in these circumstances, "does not violate the Federal Constitution." See 13(2)R. 533 at 545, 547.

Thereafter the appellants each received a sentence of three months imprisonment in the county jail, which sentence was suspended on condition that a $100 fine be paid. See 13(1)R. 312-314; 13(2)R. 552. The fines were paid and the appellants were not committed.

In due course notices of appeal were filed by the appellants in the respective proceedings. While these two appeals were pending before the Appellate Division of the Superior Court of New Jersey, the Supreme Court of New Jersey "certified the matter on our own motion before argument in the Appellate Division" in both cases. See 13(1)R. 317; 13(2)R. 554. The arguments which had been made in the new trial motion and which had been ruled on by the County Court were renewed before the Supreme Court. That court ruled in the Naglee-Garrity-Virtue appeal that the convictions were proper and that the references to possible employment forefeiture did not render the incriminating statements involuntary or inadmissible under the Fourteenth Amendment. As to the claim that the New Jersey employment forfeiture statute, as applied in these circumstances, was invalid under the Fourteenth Amendment, the Supreme Court stated (13(1)R. 327):

> The defendants further contend that N.J.S.A. 2A:81-17.1 is unconstitutional. As we have mentioned earlier in this opinion, Mr. Rigg did not expressly threaten to invoke the sanction of the statute against the defendants Garrity and Virtue. The warning he gave them was to the effect that if they did not cooperate in the investigation they might be subject to dismissal as a result of a

subsequent proceeding. We determined that such a dismissal would be proper even in the absence of a statute. Therefore, we conclude that the defendants, in the circumstances of this case, are not in a position to challenge the constitutionality of the statute.

The Supreme Court found that the Holroyd-Elwell-Murray appeal presented circumstances substantially similar to those in the Naglee-Garrity-Virtue appeal; it further found that the applicable legal principles were identical. The court accordingly entered a *per curiam* opinion affirming the covictions largely on the basis of the reasoning in the Naglee-Garrity-Virtue opinion. See 13(2)R. 553.

THE QUESTION OF JURISDICTION

In its order of March 21, 1966, this Court postponed further consideration of the question of jurisdiction of this appeal to the hearing of the case on the merits. 383 U.S. 941. It thus becomes essential to determine whether this Court's appeal jurisdiction has been properly invoked. See Rule 16(4) of this Court's Rules.

Basically, under 28 U.S.C. § 1257(2), a state court judgment may be reviewed by appeal to this Court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." The factors that here become relevant in assessing the propriety of invoking that appeal jurisdiction are twofold:

(1) The federal constitutional validity of a state statute must have been drawn in question in the courts

below by the protesting parties. *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655.

(2) The decision below must necessarily have involved an adverse resolution of the constitutional issue. But "it is not necessary that the ruling shall have been put in direct terms," as was said in *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67. "If the necessary effect of the judgment below has been to deny the claim that is enough." *Ibid.*

Those factors were satisfied in these proceedings. At the trial court level, the Camden County Court, the appellants in the two proceedings claimed not only that the admission of their statements violated the Fourteenth Amendment but that the New Jersey statute relating to employment forfeiture for public employees declining to testify, N.J.S.A. 2A:81-17.1, was unconstitutional in light of the Fourteenth Amendment. See 13(2)R. 531-532, 534, 545. This contention as to the statute's invalidity was expressly denied by the Camden County Court, which concluded "that N.J.S. 2A:81-17.1 does not violate the Federal Constitution." 13(2)R. 547.

The appellants pursued this contention before the Supreme Court of New Jersey. In the Garrity brief before that court (pp. 43-44) it was asserted that this statute "is unconstitutional and violates the . . . Fourteenth Amendment of the United States . . . because it condemns a person for exercising a legal right." The Holroyd brief (p. 15) argued that if this state statute "requires the present result, it is invalid as applied here, since if conflicts directly with the requirements of the Fourteenth Amendment." The State's brief (p. 12), replying jointly to both the Garrity and Holroyd briefs, urged that the federal

constitutionality of the statute "is not properly raised in this appeal . . . [since] the only real issue in this case is the voluntariness of the statements."

In accepting the State's analysis and in declining to pass upon the federal constitutionality of the New Jersey statute, the Supreme Court of New Jersey did not avoid passing upon the Fourteenth Amendment claim relative to that statute's validity as advanced by the appellants. It necessarily rejected that claim. While the court ruled that the appellants, "in the circumstances of this case, are not in a position to challenge the constitutionality of the statute," 13(1)R. 327, that determination is not decisive or binding on this Court. On matters of standing to raise federal constitutional issues, including standing to question the federal constitutional validity of state statutes, this Court alone is the final arbiter; and in so acting, this Court operates independently of any state court determination as to standing. *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 525.

Thus where the sole basis of the state court's refusal to pass upon a federal constitutional claim is the claimant's supposed lack of standing, a matter within this Court's exclusive province, the refusal must be classed as among those denials of federal constitutional claims which will support an appeal to this Court. It has long been settled that constitutional rights may be denied as much "by the refusal of the state court to decide the question, as by an erroneous decision of it." *Lawrence* v. *State Tax Commission,* 286 U.S. 276, 282; and see *Greene* v. *Louisville & Interurban R. Co.,* 244 U.S. 599, 508; *Smith* v. *Cahoon,* 283 U.S. 553, 564. The particular grounds for such refusal become immaterial, be they lack of standing or some other state procedural

defect. Otherwise, state courts could deprive appellants of their right to appeal to this Court by the simple expedient of finding some procedural reason for ignoring or failing to resolve federal constitutional claims properly raised before them.

Moreover, the claims as to the invalidity of the New Jersey statute under the Fourteenth Amendment were in this instance so intertwined with the claims as to the constitutional impropriety of admitting the incriminating statements (an issue appellants concededly had standing to raise) that the express denial of the latter claims must be construed as encompassing a denial of the former. As subsequently developed herein, the appellants' position is that the major factor contributing to the constitutionally involuntary nature of their statements was the threat of the use of the New Jersey statute in question to deprive them of their jobs and economic livelihood. Thus there is inevitably brought into issue the constitutional validity of N.J.S.A. 2A:81-17.1 as used or applied to formulate a threat, depriving the appellants of their free will in determining whether or not to plead the privilege against self-incrimination. And plainly when a state court has in effect sustained the validity of a state statute as applied to such a set of circumstances as are here present, the "validity" of the statute has been sustained for purposes of an appeal within the meaning of 28 U.S.C. § 1257(2). See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282. Equally plain is the fact that these appellants, having been convicted through use of the incriminating statements induced by threat of invoking the statute, have standing in this Court to protest the validity, under the Fourteenth Amendment's Due Process Clause, of the statute as applied.

The foregoing discussion, of course, relates only to Question 1(a) presented in the Jurisdictional Statement and repeated herein, p. 4, *supra*. The other two questions—Question 1(b) relative to the admissibility of the statements under the Fourteenth Amendment, and Question 2 relative to the due process implications of the investigatory actions of the Supreme Court of New Jersey in these proceedings—are not independently reviewable by appeal since they do not involve the validity of state statutes. But if appellants are correct in assessing Question 1(a) as an appealable issue, the other questions can be considered on the appeal papers at the same time. As noted in *Flournoy* v. *Wiener*, 321 U.S. 253, 263, once an appellant has properly invoked this Court's appeal jurisdiction, he may include in the questions presented on the appeal "any other denial of federal right whether or not capable in itself of being brought here by appeal." See *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547; *Mishkin* v. *New York*, 383 U.S. 502, 512.

But if appellants be wrong as to the eligibility of Question 1(a) for this Court's appeal jurisdiction, or if this Court does not wish to consider the other non-appealable questions as part of the appeal as to Question 1(a), appellants rest upon the provisions of 28 U.S.C. § 2103. Under that provision any or all questions that are not properly appealable or that cannot be considered as part of a proper appeal must be regarded and acted upon as though contained in a petition for writ of certiorari and as duly and timely presented to this Court. The questions here involved are obviously deserving of the grant of certiorari; and this Court should not only grant the writ but proceed to decide the questions on their merits.

SUMMARY OF ARGUMENT

The New Jersey statute in issue, N.J.S.A. 2A:81-17.1, provides that any person holding public office who refuses to testify upon matters relating to his office or employment in any criminal proceeding wherein he is a defendant upon the ground that his answer may tend to incriminate him shall (1) be removed from his public office, (2) forfeit any vested or future right or tenure or pension granted him by the State, and (3) be thereafter ineligible for election or appointment to any public office or employment in the State.

During the course of an inquiry into the performance of their public duties, the appellant policemen made incriminating statements which were later used against them in criminal proceedings. These statements were secured following a two-part warning to each appellant: (1) any incriminating statement could be used against him, and (2) any invocation of his conceded privilege against self-incrimination might result in his removal from office under the laws of the state—obviously referring to N.J.S.A. 2A:81-17.1. Additionally, New Jersey has no immunity statute applicable in these circumstances, and no suggestion of possible immunity was made to the appellants. The following constitutional considerations emerge from these circumstances:

(1) The introduction and use at the criminal trials of such incriminating statements violated the Due Process Clause of the Fourteenth Amendment. Those statements had been secured as the result of the mental coercion implicit and intended in the threat of removal from office should the privilege against self-incrimination be invoked. The whole purpose of the threat,

confirmed by the legislative intent in enacting N.J.S.A. 2A:81-17.1, was to induce the appellants to forfeit their privilege and to incriminate themselves—thereby removing the so-called "impediment" to investigation represented by the privilege. Thus was destroyed the free will which must surround any decision respecting the invocation or waiver of the privilege. And the resulting statements cannot be described as other than coerced.

(2) The choice imposed upon appellants, the choice between incrimination or job forfeiture, is not one which a state may constitutionally impose. No state may force an individual to "a choice between the rock and the whirlpool" or "impose conditions which require the relinquishment of constitutional rights." *Frost Trucking Co.* v. *Railroad Commission,* 271 U.S. 583, 593-594. Such an alternative deprived each appellant of "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan,* 378 U.S. 1, 8. The appellants could not make free and rational choices under these circumstances.

(3) The fact that appellants "waived" the privilege and made incriminating statements does not make the coercive threat of employment forfeiture any less significant. The prime purpose of the threat was to force appellants to do precisely what they did do—*i.e.,* forfeit the privilege and incriminate themselves. A successful threat is nonetheless a threat and a coercive tactic.

(4) The provisions of N.J.S.A. 2A:81-17.1, as used here to formulate a threat to inhibit the free exercise

of the privilege against self-incrimination and to force the making of incriminating statements, must be considered invalid under the Due Process Clause of the Fourteenth Amendment. The privilege is a delicate and vulnerable matter, supremely precious in our society. And with respect to such matters, "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433. It is not necessary to await an actual discharge to discern the capacity of this statute to intrude upon constitutional rights and privileges. The very threat of invoking the statute served to deter and destroy the privilege in these circumstances. To that extent, the statute must be deemed invalid. And the appellants, having been the victims of that threat and having lost their freedom of action respecting the privilege, have standing to protest the constitutionality of the statute. Standing, of course, is a matter for determination by this Court; the ruling of the court below that appellants lack standing is not binding. *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 525.

(5) The fact that the appellants were police officers does not destroy their rights relative to the free exercise of the privilege against self-incrimination. Nor does it take from them any rights under the Due Process Clause respecting the introduction and use of incriminating statements obtained by coercive threats. Police officers do not, as a condition of office or by virtue of the lack of any constitutional right to be a policeman, forfeit the constitutional rights and privileges guaranteed to all individuals. Recognition of those rights and privileges does not deny the state's legitimate concern in maintaining and enforcing appropriate

obligations of police officers and in imposing sanctions for actions inconsistent therewith—at least where due process is respected in enforcing such obligations. But these obligations and sanctions, which are not directly in issue here, cannot rise to the point of intrusion upon universally recognized rights and privileges of a constitutional nature. The decision in *Slochower* v. *Board of Education,* 350 U.S. 551, 558-559, recognizes that line of demarcation between constitutional rights and the obligations of public office. In the instant proceedings, that line is breached by any notion that the obligations of police officers justify the destruction of the privilege against self-incrimination or justify the compulsion resulting in the incriminating statements.

Finally, the action of the Supreme Court of New Jersey in ordering the investigations into appellants' activities and participating thereafter in the referral of the matter for prosecution and in the review of the ensuing convictions served to deprive appellants of due process of law in a most elemental sense. Such action by the highest court of the state served to take the "appearance of justice" away from the entire judicial system, influenced as it is by that court. The possibility and appearance of unfairness and prejudgment springing from the judiciary's actions as investigator, prosecutor and judge are too great to escape condemnation under the Due Process Clause of the Fourteenth Amendment. *In re Murchison,* 349 U.S. 133; *Tumey* v. *Ohio,* 273 U.S. 510.

ARGUMENT

I

THE THREAT OF EMPLOYMENT FORFEITURE TO INDUCE ONE TO FOREGO THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THUS TO INCRIMINATE ONESELF RENDERS THE RESULTING STATEMENTS COERCIVE AND HENCE INADMISSIBLE IN STATE CRIMINAL PROCEEDINGS. THE STATE EMPLOYMENT FORFEITURE STATUTE, SO USED AS A THREAT, IS INVALID UNDER THE FOURTEENTH AMENDMENT.

A. General Principles as to Involuntary Statements

There can be no quarrel here with the proposition, repeatedly enunciated by this Court, that the Due Process Clause of the Fourteenth Amendment "invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice." *Lee* v. *Mississippi,* 332 U.S. 742, 745. As was said in *Leyra* v. *Denno,* 347 U.S. 556, 558, and repeated in *Payne* v. *Arkansas,* 356 U.S. 560, 561, "The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment."

The coercion employed to deprive a confession or incriminating statement of its voluntariness need not, of course, be of a violent or physical nature. A statement obtained through use of improper threats or inducements is as constitutionally defective as a statement secured through use of the rack or screw. "Since *Chambers* v. *Florida,* 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama,* 361 U.S. 199, 206. Interrogation that is "psychologically rather than physically

oriented," as demonstrated in *Miranda* v. *Arizona,* 384 U.S. 436, 448, may be such as to drain from the resulting statement its truly voluntary characteristics. Even so mild a tactic as the refusal to allow a suspect to call his wife until he confessed may, under certain circumstances, amount to impermissible coercion. *Haynes* v. *Washington,* 373 U.S. 503.

Whatever the case, whatever the means of interrogation employed, the critical question "is whether the defendant's will was overborne at the time he confessed," *Lynumn* v. *Illinois,* 372 U.S. 528, 534. The "true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement *of any sort,*" *Wilson* v. *United States,* 162 U.S. 613, 623 (emphasis added).

This concept of voluntariness and freedom from any kind of compulsion in making incriminating statements is an integral part of the constitutional notion that one's assertion or waiver of the privilege against self-incrimination must be the product of a rational intellect and a free will. The exclusion from state criminal trials of statements that are "the result of the deprivation of his [the defendant's] free choice to admit, to deny, or to refuse to answer," *Lisenba* v. *California,* 314 U.S. 219, 241, is but one way of enforcing the constitutional command respecting "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan,* 378 U.S. 1, 8. In this sense and at this juncture, as the *Malloy* case demonstrates, 378 U.S. at 6-9, the traditional due process concepts of the Fourteenth Amendment and the self-incrimination concepts of the Fifth Amendment coalesce.

Thus the emphasis, viewed from either constitutional standpoint, is always upon the exercise of free will involved in the making of an incriminating statement. If that freedom or free will has been overcome through either physical or mental coercion of any kind then the resulting statement is violative both of the due process principles and of the privilege against self-incrimination.

B. Application of Those Principles to These Appellants

Tested by the standards of voluntariness and free will heretofore employed under either constitutional approach, the statements taken from these appellants cannot stand scrutiny. The determination by the Supreme Court of New Jersey (see 13(1)R. 323 and 13(2)R. 557-558) that there was "no physical coercion, no overbearing tactics of psychological persuasion, no lengthy incommunicado detention, and no efforts to humiliate or ridicule the defendants" and that "the interrogation was conducted with a high degree of civility and restraint" is neither decisive nor particularly relevant.[4] The critical and undeniable fact remains that each appellant's statement was taken following a two-part warning by the State's Deputy Attorney General:

(1) A statement to the effect that the individual under investigation has, under the laws of New Jersey, a privilege to refuse to disclose any matter which might

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[4] The appellants Holroyd, Elwell and Murray, unlike the other appellants, made their statements in the presence of their lawyer. That fact was said by the Supreme Court of New Jersey to make the circumstances as to them "even more persuasive of voluntariness" than was true with respect to the unrepresented appellants. See 13(2)R. 558.

tend to incriminate him, a privilege that was waived if he did thereafter make an incriminating disclosure.[5]

(2) A statement to the effect that the privilege is limited, or "somewhat limited," by the fact that if the individual refused to answer questions concerning his official duties as a police officer a proceeding "may be brought against you under the laws of our state . . . to have you removed from office." The state law or statute thus referred to was N.J.S.A. 2A: 81-17.1, providing for the summary and permanent forfeiture of state office, and eligibility therefor, of any public employee who asserts the privilege against self-incrimination or who refuses to testify concerning the conduct of his public office. Both the prosecutor and the trial court later made clear that, in their judgment, this statutory provision either justified or required the warning about the possible loss of public

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[5] "Although not written into our State Constitution (as it is in the Fifth Amendment to the Federal Constitution and in the constitution of all our sister states except Iowa), and not given even statutory expression until it appeared as section 4 of the Evidence Act of 1855 . . . the privilege has been firmly established in New Jersey since our beginnings as a State." *State* v. *Fary*, 19 N.J. 429, 435, 117 A. 2d 499, 501. See also *Laba* v. *Newark Board of Education*, 23 N.J. 364, 389, 129 A. 2d 273, 287.

The New Jersey privilege against self-incrimination is now codified as Rule 25 of the Rules of Evidence adopted by the Supreme Court of New Jersey (July 1, 1965), N.J.S.A. 2A :84A-19.

employment, not as a threat but in explanation of the individual's rights. See 13(1)R. 16-30.[6]

Analytically and realistically, these warning statements by the Deputy Attorney General offered the appellants the choice between only two real alternatives—either to incriminate themselves or to forfeit their public employment. While repeated references were made to the right under state law not to incriminate themselves, the appellants were quickly advised that this right would be waived by voluntary disclosure of any incriminating facts and those facts would be usable in any subsequent criminal proceeding. And they were then told in no uncertain terms that any assertion of that privilege might subject them to proceedings to remove them from office.

Here, then, was no simple or free choice between speaking or remaining silent. If one chose to remain silent in reliance on the privilege against self-incrimination, one was on notice of the possibility of immediate and permanent removal from public office. But if one chose to speak, one knew not only that the privilege was waived but that the ensuing testimony could be used for criminal prosecution purposes. Overshadowing this latter choice, moreover, was the fact

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[6] The court below stated that the State's Deputy Attorney General at the time of warning about the possible loss of employment "neither referred to the statute by name nor quoted from it" and thus did not "expressly threaten to invoke the sanction of the statute." See 13(1)R. 324, 327. But there can be no question, particularly in light of the later statements by the prosecutor and by the trial court, that N.J.S.A. 2A:81-17.1 was the statute Deputy Attorney General Rigg referred to in threatening the loss of employment should the privilege against self-incrimination be invoked. No other statute having that effect was suggested by the Supreme Court of New Jersey. Indeed, there is none.

that New Jersey has no general or special immunity statute usable to protect appellants from the criminal consequences of their own testimony.[7] Indeed, the very prosecutions and convictions now before this Court stand as mute testimony to the fact that no immunity was possible under New Jersey law once appellants began their incriminating statements. Cf. *Regan* v. *New York,* 349 U.S. 58; *Stevens* v. *Marks,* 383 U.S. 234.

In sum, the appellants were forced either to incriminate themselves or to lose permanently their right to public employment. Whatever privilege they had to remain silent, to refuse to incriminate themselves, was said to be limited by the New Jersey statute, N.J.S.A. 2A:81-17.1, forfeiting their public office upon the assertion of the privilege. As the Supreme Court of New

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[7] New Jersey has no general immunity statute, either of an automatic or conditional nature, comparable to that in New York. See *Stevens* v. *Marks,* 383 U.S. 234, 242. New Jersey does have eight statutes conferring immunity in special situations not here applicable:

1. Proceedings before Waterfront Commission of New York Harbor. N.J.S.A. 32:23-86(5).

2. Proceedings before state Civil Service Commission. N.J.S.A. 11:1-15.

3. Proceedings under Banking Act of 1948. N.J.S.A. 17:9A-263.

4. Proceedings before Board of Public Utility Commissioners. N.J.S.A. 48:2-36.

5. Proceedings under state Savings and Loan Act. N.J.S.A. 17:12A-90.

6. Proceedings under New Jersey Securities Law. N.J.S.A. 49:1-19; 49:1-20.

7. Proceedings to recover penalties under statute controlling shellfish and shellfish industry. N.J.S.A. 50:5-11.

8. Investigations by State Water Policy Commission. N.J.S.A. 50:1-29.

Jersey has made plain, *Laba* v. *Newark Board of Education,* 23 N.J. 364, 393, 129 A. 2d 273, 289, once the public employee has asserted the privilege in an investigation into the conduct of his office "then dismissal is mandatory." Or, as put more bluntly in *Lowenstein* v. *Newark Board of Education,* 35 N.J. 94, 101, 171 A. 2d 265, 268, the obligation of the public employee to respond fully is so strong that he is "without any right to rely on the constitutional privileges."

The thrust of the statute in question becomes clear. It was designed "to remove the impediment to investigation which is contained in constitutional provisions protecting the privilege against self-incrimination" and to "penalize any person who refuses to testify upon matters relating to his office . . . by requiring that he forfeit his office."[8] The only alternative to such forfeiture, of course, was the one the appellants chose—self-incrimination without any possible immunity from prosecution.

This is precisely the kind of improper choice referred to in *Frost Trucking Co.* v. *Railroad Commission,* 271 U.S. 583, 593, quoted last term in *Stevens* v. *Marks,* 383 U.S. 234, 243—"a choice between the rock

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[8] Statement appearing at end of the New Jersey Senate bill that became N.J.S.A. 2A:81-17.1, reprinted in full in the Appendix A hereto, pp. 1a-2a, *infra.* That statement also recognized that the argument could be made "that the bill in effect nullifies the constitutional protection against self-incrimination for the public officials involved. They may exercise their privilege, but to do so involves the loss of their primary livelihood." But the statement went on to point out that it could be said, however, "that one bill will not deprive any person of his constitutional right to refuse to testify, but does provide that no person serving the public can hide his criminality behind that privilege and still hold public office. An official may assert his constitutional right, but he has no constitutional right to hold his office."

and the whirlpool." New Jersey has here forced each appellant, to quote further from the *Frost* case, to "an option to forego a privilege [public employment] which may be vital to his livelihood, or to submit to a requirement [self-incrimination] which may constitute an intolerable burden." Such an option, such a choice, no state can constitutionally force upon a citizen. No state, said this Court in *Frost,* at p. 594, may "impose conditions which require the relinquishment of constitutional rights," for "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all" and it is "inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." See also the state-imposed choice held invalid in *Baggett* v. *Bullitt,* 377 U.S. 360, 374.[9]

Such a state-imposed choice of evils is the very antithesis of a *free* choice by the individual concerned. At the very juncture when these appellants should have had complete freedom in determining whether to remain silent in reliance on their privilege or to incriminate themselves, these appellants were forced instead to choose between forfeiting their jobs or incriminating themselves.

That kind of alternative deprived each appellant of the right which *Malloy* v. *Hogan,* 378 U.S. 1, 8, speaks of as "the right of a person to remain silent unless he

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[9] In *Baggett* this Court held that "The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where 'the free dissemination of ideas may be the loss.'" 377 U.S. at 374.

chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." To advise a person under investigation that he has a right not to incriminate himself but that if he exercises that right he may suffer summary and permanent loss of his job must be classified as among those "interrogation practices which are likely to exert such pressure upon the individual as to disable him from making a free and rational choice." *Miranda* v. *Arizona,* 384 U.S. 436, 464-465. What purpose is served by informing the individual that if he asserts the privilege against self-incrimination he "may be subject to a proceeding to have you removed from office" other than to force him against his free will to abandon the privilege?[10] When the stated purpose of the job forfeiture statute is "to remove the impediment to investigation which is contained in constitutional provisions protecting the privilege against self-incrimination," is there any doubt that the "impediment" is the privilege itself and that the warning about possible loss of employment is designed to frighten the person into abandoning the "impediment"?

But to remove that "impediment" by threat of job forfeiture is completely contrary to any exercise of free will in the matter on the part of the individual concerned. The very nature of the statute is such as to be a brooding inducement, a covert threat and a coercive tactic, all designed to impel the person under investigation to abandon his privilege against self-incrimination—and to abandon it precisely at the point

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[10] In the trial judge's words, "We have a situation here where the attorney general, in my opinion, at least, is telling him you have a choice of either relying upon the constitutional rights, but if you do, I want to inform you that by the state law of New Jersey, you may get hurt as far as a penalty is concerned." 13(1)R. 23.

in time when *Malloy* v. *Hogan* says the individual must make a determination about exercising or abandoning the privilege "in the unfettered exercise of his own will."

Indeed, the determination to waive the privilege and to make incriminating statements that may subject one to criminal prosecution, particularly in the absence of any immunity statute, is so critical and so fraught with serious consequences that particular care should be taken to insure that the freest possible atmosphere surrounds the determination. That type of decision deserves the most careful consideration without the distraction and compulsion of pressures other than those within the four corners of the decision itself.

But the atmosphere cannot be free if the threat of employment forfeiture hangs over the determination, a threat which deals with a matter foreign to the relevant and rational considerations at stake. And to say, as the prosecutor here said, that the references to the forfeiture possibilities were merely an explanation of legal rights to which appellants were entitled is merely a bootstrap argument; if those so-called "legal rights" are inherently a coercive threat the very "explanation" of them becomes the vehicle for conveying that threat. Not even the Supreme Court of New Jersey could deny that such an "explanation" constituted "compulsion"; it merely said that the warning "was a type of compulsion which may be legitimately used." 13(1)R.325.

C. The Coercion Implicit in the "Waiver" of the Privilege

Moreover, the coercive pressure implicit in the references to possible employment forfeitures is nonetheless constitutionally significant because the appellants here "waived" their privilege and incriminated them-

selves. While impossible of precise measurement, the coercion that is the heart and the intent of the employment forfeiture statute must be assumed to have had its impact. And any determination to forego the privilege after being warned about this statute, however absent may be the indicia of other forms of coercion, must be assumed to be impregnated with this statutory threat. Just as the denial of the right to the assistance of counsel is assumed to be prejudicial without indulging "in nice calculations as to the amount of prejudice arising from its denial," *Glasser* v. *United States,* 315 U.S. 60, 76, so must a statutory threat of employment forfeiture be assumed to be prejudicially effective without indulging in "nice calculations."

Faced with the choice between losing their privilege or losing their livelihood, these appellants chose the former, the loss of the privilege, as what they considered to be the lesser of two evils. But as Mr. Justice Holmes wrote in *Union Pacific R. Co.* v. *Public Service Commission,* 248 U.S. 67, 70,

> "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

In other words, the fact that the appellants bent to the coercive thrust of the employment forfeiture statute does not make their actions constitutionally voluntary. "Were it otherwise," Mr. Justice Holmes has said, "as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . ." *Ibid.,* at 70.

And the coercion was nonetheless significant because there may have been evidence other than the incriminating statements justifying the verdicts of guilt. It is too late in the day to question the settled proposition that " a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard to the truth or falsity of the confession, *Rogers* v. *Richmond,* 365 U.S. 534, and even though there is ample evidence aside from the confession to support the conviction." *Jackson* v. *Denno,* 378 U.S. 368, 376.

It follows that appellants' statements, made under the threat of having their public employment terminated should they invoke their conceded privilege against self-incrimination, must be considered the products of a constitutionally coercive threat and hence must be deemed inadmissible at their trials. The convictions must thus be considered invalid under the Due Process Clause of the Fourteenth Amendment.

D. The Constitutional Invalidity of the New Jersey Statute

It now becomes plain that, as used and applied in the circumstances of these proceedings, the New Jersey employment forfeiture statute, N.J.S.A. 2A:81-17.1, must be considered invalid under the Due Process Clause of the Fourteenth Amendment.

That statute was used here as a threat, a coercive tactic, to induce the appellants to forego their privilege against self-incrimination and to incriminate themselves. The free exercise of that privilege, like the free exercise of the First Amendment freedoms, is a matter both "delicate and vulnerable, as well as

supremely precious in our society." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433. And it is now well established that, with respect to such matters, "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Ibid.,* 433; and see *Dombrowski* v. *Pfister,* 380 U.S. 479, 486.

Thus the mere threat of employment forfeiture, as shown in these proceedings, may have as chilling an effect upon the free exercise of the privilege against self-incrimination as an actual dismissal under the statute in question. That being the case, it is not necessary to await the fall of the heavy hand of the statute to discern its capacity for intrusion upon rights and privileges of transcendent value in our constitutional way of life. It can be seen, here and now, that the statute has an inhibiting effect upon the privilege against self-incrimination. In other words, the threat of invoking the sanctions of this statute has operated to restrict and to preclude appellants' free exercise of the privilege, resulting in forced self-incrimination. To that extent and as here applied, N.J.S.A. 2A:81-17.1 must be considered constitutionally defective.

By the same token, appellants must be considered as having standing to protest the constitutionality of this statute. They are the individuals whose freedom was inhibited by the coercive threat of the statute. Had that threat not been made, they conceivably might have invoked their privilege. Thus they have been directly and intimately affected by the coercive threat which in itself constitutes the constitutional defect of the statute. And under the repeated decisions of this Court, appellants have standing to complain of the potential and actual deterrence of the free exercise of their freedoms and privileges. See *Cramp* v. *Board*

of Public Instruction, 368 U.S. 278, 283-284; *Staub* v. *City of Baxley,* 355 U.S. 313, 319; *Smith* v. *Cahoon,* 283 U.S. 553, 562. The contrary ruling of the court below is of course not controlling here. *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 525.

Under these circumstances it becomes appropriate for this Court to declare that N.J.S.A. 2A:81-17.1, as applied in terms of a threat to inhibit the free exercise of the privilege against self-incrimination, resulting in the involuntary making of incriminating statements, is violative of the Fourteenth Amendment's Due Process Clause.

II

APPELLANTS' STATUS AS POLICE OFFICIALS DOES NOT MAKE ADMISSIBLE INCRIMINATING STATEMENTS OBTAINED UNDER THREAT OF EMPLOYMENT FORFEITURE

The fact that the various appellants were police officers and officials and that the investigations were directed toward their conduct in office played a decisive role in the decisions of the Supreme Court of New Jersey in these cases. While acknowledging that policemen have the right to assert their privilege against self-incrimination, 13(1)R. 325, the court held that (1) policemen hold sensitive positions in regard to reporting and prosecuting violations of law, (2) they may be discharged for asserting the privilege against self-incrimination, predicated on a failure to cooperate in a situation where duty compels cooperation, and (3) hence the warning to the policemen that their refusal to answer questions might subject them to removal proceedings "was a type of compulsion which may be legitimately used." 13(1)R. 325.

The court below was quite correct, of course, in recognizing that policemen, like other public employees

and like all other citizens, are entitled to the benefits of the privilege against self-incrimination. See *Stevens* v. *Marks*, 383 U.S. 234, 243-244. That great privilege does not lend itself, conceptually or in practice, to some hidden exception with respect to policemen in particular or public officials in general. And, by the same token, policemen are no less entitled to the full benefits of the Due Process Clause of the Fourteenth Amendment when they chance to be under investigation or prosecution. That Clause knows no distinctions between policemen and other individuals. It is offended by the introduction at trial of any incriminating statement obtained by mental or physical duress, be the defendant a bricklayer, a housewife or a public officer.

The critical question here remains what it has always been, *i.e.*, were the incriminating statements obtained from the appellant policemen by threats of employment forefeiture, threats which deprived their statements of the volitional nature that the Due Process Clause demands? If it be true, as appellants urge, that those threats were destructive of the unfettered exercise of appellants' own will in resolving to forego the privilege against self-incrimination, the fact that appellants occupied public office can neither alter the destructive impact nor restore the free will of appellants. The Due Process Clause remains as a barrier to the introduction of statements obtained under such circumstances.

It may well be, as the court below suggested, that a police officer who refuses to cooperate in a proper investigation of his official conduct is acting inconsistently with his police duties. And it may well be that such a police officer is properly subject to subse-

quent dismissal proceedings, as the numerous state courts cited by the court below have held. 13(1)R. 325.[11] It may even be true that this obligation to cooperate "does not depend on the existence of a statute or rule" but is "intrinsic to the position of a police officer." 13(1)R. 325.

But the constitutional or legal propriety of those considerations is not here at stake. Nor are those considerations at all relevant in this setting. These appellants have not been charged with actions inconsistent with their obligations as police officers; they have not been dismissed for having asserted their privilege against self-incrimination. The only issue here concerns the constitutional validity of a coercive threat directed toward compelling the appellants to abandon their privilege against self-incrimination. And the validity of that threat is not affected by the capacity at some later point in time to make good on the threat. Only the constitutional implications of the threat itself, considered as of the time the threat was made, are here relevant.

Indeed, to the extent that the concern with the policeman's obligation to cooperate in official inquiries is carried to the point of denying to the policeman his constitutional rights with respect to those inquiries, the concern by definition over-extends itself. It then becomes a part of the notion that policemen and public officials somehow forfeit all constitutional rights re-

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[11] See, *e.g.*, *Fallon* v. *New Orleans Police Department*, 238 La. 531, 115 So. 2d 844; *Fichera* v. *State Personnel Board*, 32 Cal. Rptr. 159; *Souder* v. *City of Philadelphia*, 305 Pa. 1, 156 A. 245; *Drury* v. *Hurley*, 339 Ill. App. 33, 88 N.E. 2d 728; *Scholl* v. *Bell*, 125 Ky. 750, 102 S.W. 248; *Christal* v. *Police Comm. of San Francisco*, 33 Cal. App. 2d 564, 92 P. 2d 416.

specting official inquiries as a condition of their public employment. That notion is impermissible in our constitutional system. This Court long ago said that no government—federal, state or local—may "impose conditions which require the relinquishment of constitutional rights." *Frost* v. *Railroad Commission,* 271 U.S. 583, 594. And no government may withhold its privileges and bounties on condition that the public employee forego such constitutional rights as the privilege against self-incrimination. See *Steinberg* v. *United States,* 141 Ct. Cl. 1, 163 F. Supp. 590, cited with approval in *Sherbert* v. *Verner,* 374 U.S. 398, 404, fn. 6.[12] Otherwise the right to assert the privilege, which right is universally acknowledged, would become meaningless. No obligation, no condition of public employment, can rise so high as to destroy and render ineffective cherished rights guaranteed to all by the Constitution.

The statement by the court below that policemen are indeed entitled to the benefits of the privilege against self-incrimination reflects the common understanding that any state statute that expressly sought to deny the privilege to policemen would unquestionably be invalid. Yet as the *Frost* case indicated, 271 U.S. at 593, "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under

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[12] In the *Steinberg* case the Court of Claims held invalid a federal statute providing that federal annuities shall not be paid to federal employees who have asserted the privilege against self-incrimination. Such a statute was said to constitute an indiscriminate classification of the innocent with the guilty and must fall as an assertion of arbitrary power.

the guise of a surrender of a right in exchange for a valuable privilege [such as public employment] which the state threatens otherwise to withhold." See also *Hanover Fire Ins. Co.* v. *Carr,* 272 U.S. 494, 507; *Alston* v. *School Board of City of Norfolk,* 112 F. 2d 992, 997 (C.A. 4); *Peck* v. *Cargill,* 167 N.Y. 391, 60 N.E. 775. Under our Constitution, "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." *Cummings* v. *Missouri,* 4 Wall. 277, 325.

Nor is any different result reached by starting with the aphorism that there is "no constitutional right to be a policeman." *McAuliffe* v. *New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (per Holmes, J.). This Court need not pause here, any more than it did in *Wieman* v. *Updegraff,* 344 U.S. 183, 192, "to consider whether an abstract right to public employment exists." It is sufficient to say, as in *Wieman,* "that constitutional protection does extend to the public servant whose exclusion [from public employment] pursuant to a statute is patently arbitrary or discriminatory." See also *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496; *Baggett* v. *Bullitt,* 377 U.S. 360; *Shelton* v. *Tucker,* 364 U.S. 479; *Cramp* v. *Board of Public Instruction,* 368 U.S. 278. It need only be added that the public servant, like any citizen, is entitled to assert a constitutional privilege or right free of any coercive threat of employment forfeiture or other penalty. Such a threat is improper as to any individual, regardless of whether his employment enjoys the high status of a "constitutional right."

There must thus be a return to the conceded proposition that policemen and public officials are entitled to

assert the privilege when faced with official inquiries. And once that proposition is accepted, it must follow that the privilege is exercisable in undiluted form. Not only must the privilege be the product of the unfettered will of such persons, but it must be usable without threat or imposition of penalty. *Malloy* v. *Hogan,* 378 U.S. 1, 8; *Griffin* v. *California,* 380 U.S. 609, 614; *Orloff* v. *Willoughby,* 345 U.S. 83, 91. That means that the public employee cannot be summarily and immediately discharged upon the mere assertion of the privilege. See *Slochower* v. *Board of Education,* 350 U.S. 551. Nor can he be cited or punished for contempt for failure to answer questions, once the privilege has been properly asserted. See *Stevens* v. *Marks,* 383 U.S. 234.

Recognition of the public employee's untrammeled right to assert the privilege, of course, does not exclude the right of the state to insist upon the maintenance of certain obligations and duties on the part of the employee. Nor does insistence upon complete freedom in asserting the privilege mean that the state may not discipline or even discharge the employee should his actions in connection with official inquiries be found to be inconsistent with those obligations. As long as the sanctions imposed for dereliction of duty comport with due process, reflect some legitimate concern of the state and are not in the nature of a penalty for asserting a constitutional right or privilege, the sanctions may be permissible.

The decision in *Slochower* v. *Board of Education,* 350 U.S. 551, involved precisely that distinction. The Court there held that New York could not constitutionally use its employment forfeiture provisions—which are virtually identical with those of New Jersey

—to cause the summary dismissal of a public employee for having invoked the privilege against self-incrimination before a congressional committee. In so doing, the Court took pains to point out that "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry will show Slochower's continued employment to be inconsistent with a real interest of the State." 350 U.S. at 559. Thus the invocation of the privilege could in some circumstances be considered inconsistent with Slochower's obligations as a public employee—but only after "proper inquiry." What was impermissible, however, was the summary use of the New York law to discharge Slochower immediately upon the assertion of the privilege—thereby causing "the heavy hand" of these provisions to fall on a public employee merely for having freely exercised a constitutional privilege "the full enjoyment of which every person is entitled to receive." 350 U.S. at 558. Such a summary discharge was held to be a direct burden upon the privilege, a penalty for having asserted it.

And so in this case, the immediate threat of summary discharge and permanent loss of employment rights came at a point in time when the appellants were entitled to complete freedom in deciding whether to assert the privilege. The threat was not made merely to enforce an obligation; its true purpose was to force the appellants to forfeit their privilege and in effect to destroy that privilege. And it is that purpose, which was plainly effectuated here, that reveals the constitutional vice in the use of the New Jersey employment forfeiture statute.

That constitutional vice, that destruction of the privilege, is in no way blunted by the possibility that New

Jersey might have used some subsequent procedure to penalize appellants for having failed to cooperate in the investigation. The court below took significant pains to disassociate the threatened dismissal from the provisions of the employment forfeiture statute, stating that the statute had not been specifically referred to in the warnings and that "dismissal as a result of a subsequent proceeding . . . would be proper even in the absence of a statute." 13(1)R. 327. Quite apart from the inconsistency of such a statement with the explicit recognition by the prosecutor and the trial court that the employment forfeiture statute was indeed the one underlying the warnings, see 13(1)R. 16-30, the possibility of subsequent proceedings resulting in dismissal cannot erase the vice of using the threat of dismissal in order to destroy the privilege at its inception, thereby forcing appellants to incriminate themselves.

Once the privilege has been asserted by a public employee it is time enough to consider what punishments and penalties may thereafter properly ensue. But in the instant circumstances, the threat of summary dismissal and permanent loss of public employment eligibility cannot be considered consistent with the employee's right freely to assert or not assert the privilege in the first instance. Such a threat of employment forfeiture must be considered a threat of punishment in one of its severest forms, for "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." *United States* v. *Lovett,* 328 U.S. 303, 316; and see *Cummings* v. *Missouri,* 4 Wall. 277, 323. And the use of so serious a threat to destroy the free assertion of the privilege and to compel incrimination can have no legitimate relationship with any power

New Jersey may have to punish a public employee who has been found to have failed in his obligations as an employee.

III

APPELLANTS WERE DEPRIVED OF DUE PROCESS OF LAW AS A RESULT OF THE ACTION OF THE NEW JERSEY SUPREME COURT ORDERING AN INVESTIGATION OF THEIR ACTIVITIES AND THEN REFERRING THE MATTER FOR PROSECUTION

On June 30, 1961, the Supreme Court of New Jersey entered orders directing the State Attorney General or his deputy to investigate the "alleged irregularities in the handling of cases in the Municipal Court of the Borough of Bellmawr" as well as in the Borough of Barrington. The Attorney General was authorized to issue subpoenas, require the attendance of witnesses and the production of documents, impound records, and conduct an *in camera* hearing before a master. This latter provision was later deleted and the Attorney General was instead directed to prepare a report of his investigation and file it with the Clerk of the Supreme Court of New Jersey. See 13(1)R. 318, 322; Appendix B hereto, pp. 3a-8a, *infra.*

During the course of this court-ordered investigation, the appellants made the incriminating statements in issue in these cases. And the Deputy Attorney General having secured such statements after warning each appellant that his employment was in jeopardy should he remain silent, the Attorney General's Office presumably made interim reports to the Supreme Court. Thereafter, and apparently with the concurrence and knowledge of the Supreme Court, the results of the investigation were referred to the Camden County Prosecutor for further investiga-

tion and for grand jury action.[13] The indictments, trials, convictions and appeals followed, the final step being the Supreme Court's certification of these cases "on our own motion before argument in the Appellate Division," 13(1)R. 317, and the affirmance by that Court of the convictions.

Thus the highest court of New Jersey was the actual instigator of these criminal cases. It became directly and intimately involved in the investigation that led to the prosecutions, convictions and affirmances of conviction. In effect that court acted as the grand jury, the grand inquistor; presumably it would not have permitted the reference of the matter to the local prosecutor and grand jury unless it had been convinced, from the Deputy Attorney General's preliminary reports, that the facts showed *prima facie* guilt and warranted the prosecutions.

Moreover, the stamp of approval given these prosecutions by the Supreme Court could not avoid having an impact upon the lower state courts dealing with these cases. An inferior court judge is not likely to ignore the fact that the members of the highest tribunal have felt that the evidence collected in the investigation, which most certainly would be developed at the trials, warranted prosecution and conviction upon proper proof of the facts.

Whatever may be the source of the New Jersey Supreme Court's power to engage in such a non-judi-

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[13] The Camden County Court noted that "Before the investigation of the Attorney General's Office was completed, the matter was turned over to the Office of the Camden County Prosecutor to continue the investigation. During the course of the investigation both the Attorney General's Office and the Prosecutor's Office took statements from the defendants at bar." 13(2)R. 533.

cial act as the instigation and approval of a criminal investigation,[14] the result is to deprive the whole course of criminal procedure in the New Jersey courts of the appearance of the basic disinterestness and impartiality which are so much a part of the hallmark of due process of law. To borrow the words used by this Court in another connection, "These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14.[15]

For the highest court of a state, influential as it must be with lower courts and judges, to act as a complainant, investigator, prosecutor and ultimate judge in a given case is as offensive to the Due Process Clause of the Fourteenth Amendment as was the action of the single judge in *In re Murchison,* 349 U.S. 133, in serving both as a "one-man grand jury" and as a judge relative to contemptuous conduct occurring in the

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[14] In *Massett Building Company* v. *Bennett,* 4 N.J. 53, 71 A. 2d 327, Chief Justice Vanderbilt reviewed at length the many non-judicial acts imposed upon the New Jersey judiciary by the State Legislature and recited the historical basis of the judiciary accepting from the Legislature the delegation of non-judicial powers. The decision in that case recognized and affirmed the principle that judges and courts are not obliged to accept legislative grants of authority if such tasks interfere with the proper functioning of the court or involve the court in situations which might reflect on the court's reputation for fairness, impartiality and independence. But the *Massett* decision did not consider the question whether a judge or court engaging in a non-judicial act can thereafter sit in review of that act.

[15] Traditionally, members of this Court who took any part in the prosecution of a case while serving in the Department of Justice before appointment to the Court do not participate in the proceedings before this Court. See, *e.g., United States* v. *Bethlehem Steel Co.,* 315 U.S. 289, 309.

grand jury proceedings. As was said in that case, 349 U.S. at 136-137:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has no interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 14.

"It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that

zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

And so in the instant proceedings, as in *Murchison,* it was a violation of due process to have the influential weight of the top judicial body of the State thrown into the investigatory and accusatory stage of a criminal proceeding. That violation was compounded by the fact that the trials, convictions and appeals all took place within the New Jersey judicial system, under the supervision of and subject to the influence of the Supreme Court of New Jersey. The possibility of unfairness and the appearance of unfairness are too strong to escape condemnation by virtue of the Due Process Clause of the Fourteenth Amendment. See *Tumey* v. *Ohio,* 273 U.S. 510, 532; *In re Murchison, supra.*

The fact that this constitutional unfairness was not raised by appellants in the New Jersey courts cannot serve to hide the issue or to invest the state court procedure with an aura of constitutional respectability. The problem is so embedded in basic areas of constitutional due process, and indeed in considerations of jurisdiction to adjudicate guilt under these circumstances, as to warrant the concern of this Court at this juncture. Additionally, another issue before this Court and the issue that was resolved in the New Jersey courts—the admissibility of the incriminating statements of the appellants—is inescapably a part of the problem posed by the admixture of the judicial and the investigatory process. If there be any possible prejudice or lack of disinterestness on the part of the state judicial system by virtue of the investigatory actions of the New Jersey Supreme Court, who can

say that such possible prejudice or lack of disinterestness may not have infected the determinations below as to the voluntariness of statements taken during the court-ordered investigation? The very fact that such a question may fairly be asked is confirmatory of the lack of "the appearance of justice" in this instance.

CONCLUSION

For these various reasons, the judgments affirming the convictions of the appellants should be reversed.

Respectfully submitted,

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